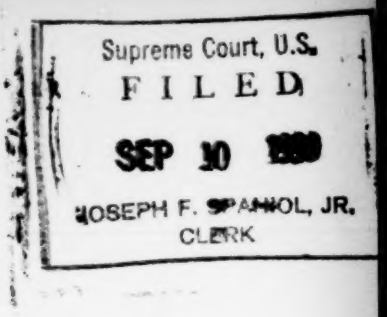
90-435



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDWIN W. HAMMOND,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY C. DUFFEY
LAW OFFICES OF SUSAN G. JAMES
AND JEFFERY C. DUFFEY
ATTORNEY FOR PETITIONER
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QUESTION PRESENTED

A warrantless search and seizure of the Petitioner's vessel, Y-Rent, exceeded all bounds of the Fourth Amendment reasonableness standard when it was a nonroutine, extended (22 to 24 hours), destructive and nondestructive search conducted without probable cause that also involved detaining the crew.

THE PARTIES

1. The caption in this case contains the name of all parties. The United States Customs Service and the United States Coast Guard would also have an interest in the case.

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OPINIONS AND ORDERS BELOW

There was no written opinion issued by the United States District Court for the Middle District of Florida, Ft. Myers Division, denying the Motion to Suppress. A notation of denial dated February 6,

1989 appears in the Docket Entries at R1-26-1. See Exhibit "A" of the Appendix. The District Court also referred to its denial of the Motion to Suppress at R3-45. See Exhibit "B" of the Appendix.

The order of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court without opinion is a nonpublished order dated June 12, 1990.

JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit was issued on June 12, 1990 and this Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

(1) 14 U.S.C. Section 89, which is set out in full in Appendix D.

(2) 19 U.S.C. Section 1581, which is set out in full in Appendix E.

STATEMENT OF THE CASE

On December 1, 1988, Petitioner was indicted for: (1) importation of in excess of 100 kilograms of marijuana in violation of 21 U.S.C. Section 952(a);

and (2) possession with intent to distribute in excess of 100 kilograms of marijuana in violation of 21 U.S.C. Section 841(a)(1). (R1-5-1).

Petitioner filed a Motion to Suppress evidence and for return of property on December 12, 1988, which stated in part the following:

> "The defendant, by his attorney, moves the court for an order suppressing as evidence any and all evidence obtained by law enforcement officials or anyone acting on their behalf, whether affiliated with Federal or state agencies, by means of a search or searches of defendant's vessel, the Y-Rent, on November 11 and 12, 1988, within the Middle District of Florida, Ft. Myers Division. This motion is made on the following grounds:
>
> 1. The search or searches were made without warrant.
>
> 2. The search or searches were made without probable cause and illegal, and without consent or permission of any person

authorized to give such consent or permission.

3. By reason of the above, said search or searches were in violation of the Fourth Amendment to the United States Constitution.

4. Defendant requests a hearing on this motion." (R1-16-1).

After a hearing on February 6, 1989, the motion was denied by the District Court. (R1-26-1). (Appendix A and B).

A jury returned a verdict of guilty on both counts on February 7, 1989. (R1-27-1).

An appeal to the United States Court of Appeals for the Eleventh Circuit followed. (R1-38-1). On June 12, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Judge without opinion. See Appendix C.

Petitioner is currently serving his 66 month sentence at the Federal Prison Camp at Eglin AFB, Florida.

STATEMENT OF THE FACTS

At about 4:00 p.m. on November 11, 1988, the Petitioner's vessel, Y-Rent, docked at the Gasparilla Marina in Punta Gorda, Florida. (R2-32, R2-26). At about 5:30 or 6:00 p.m. on that date, agents of the United States Customs Service and Coast Guard boarded Petitioner's vessel, Y-Rent, to conduct a routine safety and inspection search. Documents were checked and the boat was checked for safety violations. No safety violations were found, nor were any documents found to be out of order. (R2-41, Defendant's Exhibit D) (R3-13, 14, 15, 19, 20, 25, 26) (R2-26) (R2-32).

The vessel Y-Rent was disabled as a motor boat at the time the vessel was boarded by the agents. (R3-19).

Even though nothing out of the ordinary was discovered, the routine safety and inspection search continued and evolved into an extensive, full stem to stern search of the vessel, Y-Rent, lasting from 22 to 24 hours. The crew was in custody, dogs were used, scuba divers were used, power tools were used, the boat was cut up and left in shambles. (R2-16 through 22, 26 though 29, 32 through 34, 39 through 41). There was some evidence that possibly some space could not be accounted for although the evidence was also that there was some unaccountable space in all vessels. (R3-15, 20).

The search continued until after midnight on November 12, 1988. The log sheets of the Coast Guard dated November 12, 1988, entered into evidence as Defendant's Exhibit D showed that the Coast Guard, between the hours of midnight and 4:00 a.m. requested permission to conclude boarding since "the boarding officer feels nothing more can be done at this point." The entry at 4:00 a.m. to 8:00 a.m. showed that the "divers had finished their sweep of the boat with negative results." (R2-41, Defendant's Exhibit D). After daylight on November 12, 1988, the vessel was towed to the Coast Guard Station in Ft. Myers, Florida. (R2-21, 22, 28). The search continued at the Coast Guard Station. Petitioner and crew were

released from custody about 4:00 p.m. on November 12, 1988. The Coast Guard maintained custody of the boat and continued the search. (R2-35, 29, 22). No contraband had been found.

Marijuana was subsequently located in the vessel approximately 24 hours after the first boarding. (R2-38, 41, Defendant's Exhibit D).

The only thing the agents had seen that looked "kind of unusual" was something about the tiller arrangement. (R3-20).

SUMMARY OF THE ARGUMENT

On November 11, 1988, the Petitioner's vessel named Y-Rent, was boarded by Customs and Coast Guard Agents. Their routine and safety inspection evolved into a extended,

nonroutine, destructive search lasting 22 to 24 hours. The Petitioner and crew were detained during this period. Under the totality of the circumstances, there was no probable cause authorizing a full stem to stern search and detention of the Petitioner and his vessel, Y-Rent. United States v. Roy, 869 F.2d 1427 (11th Cir. 1989).

ARGUMENT

I.

A WARRANTLESS SEARCH AND SEIZURE OF THE PETITIONER'S VESSEL Y RENT EXCEEDED ALL BOUNDS OF THE FOURTH AMENDMENT REASONABLENESS STANDARD WHEN IT WAS A NON-ROUTINE, EXTENDED (22 TO 24 HOURS) DESTRUCTIVE AND NON-DESTRUCTIVE SEARCH CONDUCTED WITHOUT PROBABLE CAUSE THAT ALSO INVOLVED DETAINING THE CREW.

"Title 14, U.S.C. Section 89(a) authorizes Coast Guard officers to board vessels and make safety and document inspections without suspicion of criminal

activity." United States v. Roy, 869 F.2d 1427, 1429 (11th Cir. 1989). Title 19, U.S.C. Section 1581(a) gives this same authority to the United States Customs Service. United States v. Villamonte-Marquez, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

There are two types of searches that occur on the water ways:

> "the limited search and the full 'stem to stern' search."
>
> "A limited search is permissible on a reasonable suspicion of criminal activity...reasonable suspicion must be more than a mere generalized suspicion or hunch...Reasonable suspicion must be based on specific articulable facts, together with rational inferences drawn from those facts, which reasonably warrant suspicion of criminal activity...Law enforcement officers may subjectively assess those facts in light of their expertise." United States v. Roy, 869 F.2d at 1430.

The case of United States v. Roy, 869 F.2d at 1430, also held that:

> "A full stem to stern search is permissible on probable cause that a crime has been, or is being, committed. To determine the existence of probable cause, we examine whether the facts and circumstances known to law enforcement officials could have warranted their reasonable belief that a crime had been or was being committed. Alternatively, we examine whether the facts in their totality, together with the synthesis of what the agents collectively heard, knew and observed, considered in light of the agent's individual experience, presented the probability that a crime had been or was being committed."

Based on the totality of the circumstances, there was no probable cause to conduct the full, stem to stern, destructive, 22 to 24 hour extensive search that was held in this case. What was had in this case was an indefinite, involuntary, incommunicato detention.

In the case of United States v. Freeman, 579 F.2d 942 (5th Cir. 1978), it is stated that:

> "The Fourth Amendment imposes a general reasonableness standard upon all searches and seizures...What is reasonable of course depends upon the circumstances of each case...The reasonableness and constitutionality of brief stops of vessels in Customs waters by Customs agents for the purpose of routine document and safety checks is beyond question.
>
> "[N]o case holds that the stop of a vessel on the seas for a document or safety check is constitutionally proscribed by the Fourth Amendment....
>
> "[T]he brief and routine Customs detention prompted by the legitimate concerns of government for the safe and lawful operation of vessels intrudes only minimally into the privacy of seafarers." 579 F.2d at 945, 946.

The Freeman case held that brief detentions for routine administrative

inspections do not violate the constitution. A subsequent search may constitutionally occur on an administrative inspection when suspicion rises to the level of probable cause. Freeman, 579 F.2d at 948. Therefore, Mr. Hammond contends that where the search goes beyond a routine safety and document inspection, the search and seizure is circumscribed by the constitutional requirements of the Fourth Amendment to the United States Constitution. 579 F.2d at 948. Although statutory authority gives the Customs and Coast Guard agents the right to conduct routine safety and document inspections of vessels, an act of Congress cannot authorize a violation of the Constitution. United States v.

Villamonte-Marquez, 77 L.Ed.2d at 28.

The case of United States v. Villamonte-Marquez, supra, held that the Customs boarding of a vessel for a document check without suspicion of wrongdoing was not in violation of the Fourth Amendment to the United States Constitution. In that case, while the agents were conducting their inspection they observed bales of marijuana in plain view. In examining that issue, the United States Supreme Court focused on the reasonableness of the type of Government intrusion. 77 L.Ed.2d 30. In that case, the Supreme Court stated that:

> "While the need to make document checks is great, the resultant intrusion on Fourth Amendment interest is quite limited...it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents...'Neither

> the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search.'" 77 L.Ed.2d 33.

The Supreme Court in Villamonte-Marquez held that the intrusion was only a modest intrusion and was reasonable and consistent with the Fourth Amendment. In the instant case, there is nothing reasonable or modest about the intrusion on the Fourth Amendment rights of Petitioner. The crew members, including Petitioner, were in custody for a lengthy period of time during the search and seizure. The search was intrusive in a major way by using scuba divers, dogs, and power tools over a period of 22 to 24 hours.

The longest detention this writer has been able to find for a warrantless

search and seizure is 16 hours in the case of United States v. Montoya de Hernandez, 473 U.S. 531, 87 L.Ed.2d 381, 105 S.Ct. 3304 (1985). Under the facts of that case, the Court held that it was reasonable within the Fourth Amendment to detain that defendant 16 hours to conduct an alimentary canal search. The Supreme Court in Montoya de Hernandez held that:

> "We hold that the detention of a traveler at the border, beyond the scope of a routine Customs search and inspection, is justified at its inception if Customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.
>
> "Under this standard officials at the border must have a 'particularized and objective basis for suspecting the particular person' of...smuggling." 87 L.Ed.2d 391.

There was no particularized objective basis for suspecting smuggling in the instant case. The Supreme Court stated that the 16 hour detention exceeded any other detention that the Court had approved but did not adopt any "hard and fast time limits". The Supreme Court stated that: "'Common sense and ordinary human experience must govern over rigid criteria'". 87 L.Ed.2d 392. In fact, the Petitioner's vessel was disabled. There was no emergency, with plenty of time to secure a warrant if probable cause existed.

In the case of United States v. Puig, 810 F.2d 1085 (11th Cir. 1987), this Court held that a border search that extended into an intrusive search was constitutional and reasonable. In that

case, small holes were drilled into the plywood section of the hull that could have easily been plugged and repaired. The Puig case held that border searches are governed by the reasonableness requirement of the Fourth Amendment. 810 F.2d at 1086. The Court adopted "a flexible test which adjusts the strength of the suspicion required for a particular search to the intrusiveness of that search." 810 F.2d at 1086. In the Puig case, there were a number of factors that raised reasonable suspicion when coupled with the experience of the agents. That is not present in this case. In the instant case, the Customs and Coast Guard officials carried this extended search beyond Fourth Amendment reasonableness standards when they

detained the crew and searched the vessel using destructive and non-destructive means, scuba divers, and dogs.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Therefore the burden should be on the Government to establish that a warrantless search and seizure is reasonable and conducted with probable cause. At the suppression hearing, the Government chose not to go forward with its burden of proof and contended the burden was on the defense.

Neither the Customs agents nor Coast Guard had probable cause to conduct the search and seizure, therefore the search and seizure was unreasonable and in violation of the Fourth Amendment to the

United States Constitution. The Motion to Suppress should have been granted and evidence excluded.

CONCLUSION

Petitioner submits the United States District Court and the United States Court of Appeals for the Eleventh Circuit have decided a case under the Fourth Amendment to the United States Constitution in the manner repugnant to the United States Constitution.

Petitioner prays that this Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions and opinions of the District Court and the Court of Appeals for the Eleventh Circuit.

Jeffery C. Duffey

APPENDIX A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U.S. V. EDWIN W. HAMMOND
(partial docket entry)

02/06/89 26 MINUTES from jury trial
Suppression mot
heard & denied
Jury selected
Opening arguments,
govt witnesses
Bellomy, Spivey,
Corpening
Defense witnesses
Huffman, Palmer,
Herring, Harper &
Hammond

APPENDIX B

THE COURT: ....

Incidentally, I intended to refer to the case of United States against Montoya in my decision with respect to the motion to suppress, and that's at 473 U.S. 531, that sets forth the criteria in such a case as this. And I believe that, as I indicated before, that the facts presented here fall within those criteria, which require me to deny the motion to suppress.

.... (R3-45).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
DO NOT PUBLISH

NO. 89-3406
Non-Argument Calendar

D.C. Docket No. 88-67-CR-FtM-17

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWIN W. HAMMOND,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

(June 12, 1990)

Before JOHNSON and CLARK, Circuit Judges,
and HILL, Senior Circuit Judge

PER CURIAM.

AFFIRMED. See 11th Cir. R. 36-1.

Judgment Entered: June 12, 1990
For the Court: Miguel J. Cortez

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: Jul 11 1990

APPENDIX D

14 U.S.C. Section 89. Law Enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such

fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

APPENDIX E

19 U.S.C. Section 1581. Boarding vessels

(a) Customs officers. Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

(b) Officers of Department of Treasury. Officers of the Department of Commerce [Department of the Treasury] and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

(c) Penalty for presenting forged, altered, or fase documents. Any master of a vessel being examined as herein

provided, who presents any forged, altered, or false document or paper to the examining officer, knowing the same to be forged, altered, or false and without revealing the fact shall, in addition to any forfeiture to which in consequence the vessel may be subject, be liable to a fine of not more than $5,000 nor less than $500.

(d) Penalty for failure to stop at command. Any vessel or vehicle which, at any authorized place, is directed to come to a stop by any officer of the customs, or is directed to come to a stop by signal made by any vessel employed in the service of the customs and displaying proper insignia, shall come to a stop, and upon failure to comply a vessel or vehicle so directed to come to a stop shall become subject to pursuit and the master, owner, operator, or person in charge thereof shall be liable to a penalty of not more than $5,000 nor less than $1,000.

(e) Seizure of vessel or merchandise. If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.

(f) Duty of customs officers to seize vessel. It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law, respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

(g) Vessels deemed employed within United States. Any vessel, within or without the customs waters, from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and, as such, subject to the provisions of this section.

(h) Application of section to treaties of United States. The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities

are or may otherwise be enabled or permitted under special arrangement with such foreign government.

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for Petitioner, hereby certify that on this 10th day of September, 1990, I placed the foregoing Petition in the United States Mail, First Class, Postage Prepaid, to Honorable Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, and I served the correct number of copies of the Petition on Terry A. Zitek, AUSA, Chief, Criminal Division, 2000 Main Street, Suite 701, Fort Myers, FL 33901, by First Class Postage Prepaid.

Jeffery C. Duffey
Attorney for Petitioner

(2)

No. 90-435

FILED
DEC 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWIN W. HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the border search of petitioner's vessel violated the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-435

EDWIN W. HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 24-25) is unreported, but the judgment is noted at 907 F.2d 1142 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. The petition for a writ of certiorari was filed on September 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of importing marijuana, in violation of 21 U.S.C. 952(a), and possessing marijuana with intent to distribute

it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 66 months' imprisonment, a $12,500 fine, and a five-year term of supervised release. The court of appeals affirmed. Pet. App. 24-25.

1. In November 1988, the vessel Y RENT, a 44-foot sailboat, traveled from Jamaica to Florida via Mexico. En route to Florida, the Y RENT encountered severe weather and experienced engine failure; petitioner, the boat's owner, asked the Auxiliary Coast Guard for help. On the afternoon of November 11, the Coast Guard towed the vessel to the Gasparilla Marina near Punta Gorda, Florida. Pet. C.A. Br. 18-19. About two hours later, agents from the United States Coast Guard, the United States Customs Service, and the Charlotte County Sheriff's Department asked permission to board the boat. Gov't C.A. Br. 1. Agent Ron Bellomy of the Sheriff's Department had observed the Y RENT to be listing in the marina as if something heavy was stowed in the stern, and he had noticed that the boat had an unusual tiller. *Id.* at 1, 2. Petitioner permitted the agents to board the vessel. The agents checked documentation and safety equipment, and they asked petitioner and his two passengers where they had been. Although all three denied having been to Mexico, petitioner was unable to produce documentation showing his last port of call. *Id.* at 1-2, 13.

The agents conducted an "admeasurement," a computation of the boat's accountable spaces, which revealed that the Y RENT contained some unaccounted for space at its stern. Gov't C.A. Br. 2. Their suspicions aroused, the agents began to inspect the Y RENT, looking in compartments, in luggage, and under cushions. With the assistance of a drug detection dog, they also looked behind some paneling and under some fixtures, and they unpacked the sails. Because the agents did not have in Punta Gorda the equipment they needed to examine the unaccountable

space, they decided to move the boat to the Fort Myers Coast Guard Station where a more thorough examination could take place the next day. The agents halted their search at approximately midnight on November 11. *Id.* at 2-3.

In the early morning of November 12, scuba divers examined the hull of the Y RENT. Shortly thereafter, the vessel was towed to the Fort Myers Coast Guard Station, a four-hour trip, where a drug detection dog again sniffed the vessel. The agents then began to search for the unaccountable space revealed by the admeasurement, by drilling a hole in the Y RENT's stern. At 4:30 p.m. they discovered a secret compartment containing more than 100 kilograms of marijuana wrapped in brown cellophane. Gov't C.A. Br. 3.

2. Petitioner filed a pretrial motion to suppress the evidence seized from the Y RENT. The district court denied the motion, stating that a warrant was not needed because the vessel was searched after coming to port from outside the country. Petitioner was subsequently convicted, and the court of appeals affirmed in an unpublished judgment order. Pet. App. 23-24.

ARGUMENT

Petitioner contends (Pet. 9-13) that the search of his vessel violated the Fourth Amendment.

As the district court found (and petitioner does not dispute), the search of the Y RENT took place at the international border, in waters immediately accessible to the open ocean. This Court has stated that at the border "the Fourth Amendment balance of interests leans heavily to the Government," *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 544 (1985), and that "the Fourth Amendment's balance of reasonableness is qualitatively

different at the international border than in the interior." *Id.* at 538. Thus, *Montoya de Hernandez* concluded that "detention * * * at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents * * * reasonably suspect that the traveller is smuggling contraband * * *." *Id.* at 541.[1]

The agents had strong grounds for suspicion that the Y RENT was carrying contraband. Under *Montoya de Hernandez,* their reasonable suspicion of drug smuggling justified the detention and further search of the vessel for the period necessary to conduct a thorough search. See *United States* v. *Puig,* 810 F.2d 1085, 1086 (11th Cir. 1987). The vessel was listing visibly in the marina, which suggested that it was heavily loaded in the rear. See *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 885 (1975) (appearance of heavy load in vehicle "may justify [reasonable] suspicion" of contraband); *United States* v. *Sharpe,* 470 U.S. 675, 683 n.3 (1985) ("heavily loaded" appearance of truck contributed to justification for investigatory stop). Further, admeasurement revealed that the vessel had an unaccountable space at its stern that could be used to hide drugs. The agents thus believed the boat was carrying something heavy near the stern that was probably stored in a hidden space. Cf. *Sharpe, supra* (covered windows of heavily loaded truck contributed to reasonable suspicion). Petitioner's inability to document his last port of call reinforced the agents' suspicions that he was trying to conceal the vessel's itinerary and cargo.

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[1] Petitioner mistakenly relies (Pet. 10-14) on *United States* v. *Roy,* 869 F.2d 1427 (11th Cir.), cert. denied, 110 S. Ct. 35 (1989), and *United States* v. *Freeman,* 579 F.2d 942 (5th Cir. 1978), to argue that Customs agents must have probable cause to search a vessel at the border. *Roy* involved a search on the high seas, not a border search. In *Freeman,* the court held that Customs agents had probable cause to search and therefore did not reach the question whether that level of suspicion was required.

Contrary to petitioner's contention (Pet. 19-20), the drilling of holes in the boat did not render the search unreasonable. The drugs eventually recovered from the Y RENT were stashed in a secret and sealed compartment. There was no way to gain access to the compartment other than by damaging the vessel, a course of action that has been held reasonable under circumstances such as the ones in this case. See *United States* v. *Puig*, 810 F.2d at 1086-1087 (drilled holes); *United States* v. *Moreno*, 778 F.2d 719, 721 (11th Cir. 1985) (drilled holes in fuel tanks); *United States* v. *Lopez*, 761 F.2d 632, 634 (11th Cir. 1985) (use of ax); *United States* v. *Sarda-Villa*, 760 F.2d 1232, 1235, 1239 (11th Cir. 1985) (use of ax and crowbar); *United States* v. *Andreu*, 715 F.2d 1497, 1499 (11th Cir. 1983) (use of electric saw). Were the rule otherwise, a smuggler could ensure his success by sealing hidden spaces "so that some damage to the vessel would be inevitable if officers attempted to conduct a full-scale search." *Id.* at 1501 n.13. Similarly, despite petitioner's objections (Pet. 20), the use of narcotics detection dogs was a reasonable means of seeking to discover the concealed contraband.[2]

Nor did the length of the search make it unreasonable. A search for hidden contraband in concealed compartments in a boat is inherently time-consuming; the agents could not have completed their search in a short time and without the special equipment needed to gain access to the secret compartment in the stern. In light of the need to tow the vessel to the nearest Coast Guard Station and resume the search there, the border search in this case was handled

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[2] The use of scuba divers to examine the exterior of the vessel did not implicate petitioner's privacy interests at all; their activities did not even constitute a "search" within the meaning of the Fourth Amendment. See *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (examination of car's exterior not Fourth Amendment search).

as expeditiously as the circumstances allowed. This Court has "consistently rejected hard-and-fast time limits" on detentions, *Montoya de Hernandez*, 473 U.S. at 543 (16-hour detention of suspected drug smuggler reasonable), but instead has allowed authorities to "graduate their response to the demands of [the] particular situation." *Id.* at 542, quoting *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983). The situation here demanded more than just a few hours, and under the principles of *Montoya de Hernandez* the government's response was entirely reasonable.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] As in *Montoya de Hernandez*, the border search rationale justified not only the detention of the vessel, but also the detention of petitioner and his crew. Moreover, petitioner and the crew were not detained under conditions that rendered their detention unreasonable. The agents allowed them to stay at a local hotel during the search at the Fort Myers Coast Guard Station.

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